In the Supreme Court of the United States

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OCTOBER TERM, 1942

No. 153

LUCKENBACH STEAMSHIP COMPANY, INC. (a corporation), as Owner of the Steamship "Edward Luckenbach",

Petitioner,

vs.

SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI (a corporation), NAVIGAZIONE LIBERA TRIESTINA, S. A. (a corporation), SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI (a corporation) (Owners and Underwriters of the Motorship "Feltre"),
HAWAII LIQUOR COMPANY, LIMITED, et al., (Cargo Claimants),

Respondents.

Petitioner's Reply Brief In Support of Petition for Writ of Certiorari

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The answer to the arguments that are advanced by respondents in opposition to the petition for a writ of

certiorari will be found in the dissenting opinion of Judge Wilbur (R. 1427-60) which is printed in full in the appendix to petitioner's opening brief.

We are confident that this court will not deny to petitioner a review of an erroneous decision in a collision case when it clearly appears from the record, as is shown conclusively in the dissenting opinion, that the decision is wholly unsupported by the evidence.

The contention of respondents that petitioner is foreclosed by the decisions of the lower courts, would, if sustained, deprive petitioner of the right to a decision based upon the established facts, and subject petitioner to a heavy award of damages because of an arbitrary rule, regardless of the facts.

Such a decision would be in violation of petitioner's right to have an admiralty appeal considered as a trial *de novo* on all the evidence.

THE COMMISSIONER AND THE LOWER COURTS MADE FINDINGS AGAINST PETITIONER'S VESSEL THAT WERE WHOLLY UNSUPPORTED BY ANY EVIDENCE WHATSOEVER.

In order to show the court clearly that the conclusions in the dissenting opinion of Judge Wilbur with respect to the lack of evidence were fully sustained by the record, and that the findings of the District Court and the decision of the majority of the Circuit Court of Appeals were clearly erroneous, we will review in detail a single finding of fault against the "Edward Luckenbach", namely, the alleged failure to take compass bearings.

An examination of the entire record will show that there was *no mention whatever* of compass bearings or of any failure to take compass bearings by the "Edward Luckenbach" in connection with fixing the location of the "Feltre".

Nor was the alleged failure to take compass bearings even referred to in the pleadings (R. 4-18; 33-49; 55-78; 78-95).

Nevertheless, the commissioner, without any foundation whatever in the evidence, or in the pleadings, found that the "Edward Luckenbach" was at fault in that, among other things, she "failed to take compass bearings of the approaching Feltre" (R. 245).

Now it may be, as respondents Hawaii Liquor Company, Limited, et al., inform this court, that the commissioner was "an experienced Special Master" (Brief p. 2), but the record shows clearly that he committed a material error in making the above finding of fault without any evidence whatever to sustain the finding. Furthermore, the alleged failure to take compass bearings, even if there had been any such failure, was not a fault under the Rules of the Road (*Wilder's S. S. Co. v. Low* (C.C.A. 9), 112 F. 161).

Petitioner filed express exceptions to the foregoing finding of fault, as follows (R. 259):

> "(3) The finding that the 'Luckenbach' was in fault for failing to take compass bearings of the 'Feltre' was clearly erroneous in that,—
>
> (a) There is no evidence whatever to support the finding, the same being based on a bald statement in

cargo claimants' brief without reference to any testimony.

(b) No claim of fault was asserted in the pleadings or at the hearing with respect to the alleged failure to take compass bearings.

(c) There is no statutory requirement for the taking of such bearings. * * *"

The District Court, however, notwithstanding the undisputed record to the contrary, overruled the exceptions, confirmed the commissioner's report, and entered a finding that the "Edward Luckenbach" was at fault for failure to take compass bearings (R. 288, 294).

On appeal to the Circuit Court of Appeals, petitioner assigned as error the finding of the District Court with respect to the alleged failure to take compass bearings, as follows (R. 310):

"XXII.

"The District Court erred in finding that the steamship Edward Luckenbach failed to take any compass bearings of the approaching Feltre, and that said bearings would have permitted the Edward Luckenbach to observe a safer margin in passing the Feltre.

XXIII.

The District Court erred in failing and refusing to find that there was no evidence whatsoever to support the finding that the Edward Luckenbach was in fault for failing to take compass bearings of the Feltre.

XXIV.

The District Court erred in failing and refusing to find that no claim of fault was asserted in the plead-

> ings or at the hearing with respect to the alleged failure of the Edward Luckenbach to take compass bearings."

The majority of the Circuit Court of Appeals, as we have shown in petitioner's opening brief, stated that the evidence generally was "*in sharp conflict*" (R. 1421), and as to whether each vessel was guilty of all the faults attributed to it "we need not inquire" (R. 1421). There is no mention of any evidence relating to compass bearings.

The findings and decree of the District Court were affirmed.

In the dissenting opinion, however, Judge Wilbur correctly disposed of the matter of compass bearings by stating (R. 1459):

> "The commissioner also found that the Edward Luckenbach was at fault in failing to take compass bearings of the Feltre. No such fault was alleged in the pleadings, and there is no testimony indicating that such compass bearings would have been of any value under the circumstances."

It is clear, therefore, that of the commissioner, the District Court, and the Circuit Court of Appeals, only the senior circuit judge who wrote the dissenting opinion reached a correct conclusion with respect to the use of compass bearings. It is equally clear that an examination of the record, as is required on a trial *de novo,* would have convinced the judges in both courts and the commissioner that there was not a syllable of testimony relating to the alleged failure to use compass bearings.

What has been said with respect to compass bearings is likewise applicable to other alleged faults found against

the "Edward Luckenbach", not discussed in the majority opinion, but conclusively disposed of in the dissenting opinion. Judge Wilbur, after a close analysis of the evidence stated (R. 1459):

> "I conclude that the Edward Luckenbach did not fail seasonably to sound the danger signal, stop and reverse.
>
> The finding of the commissioner and the trial court that the Edward Luckenbach proceeded at an immoderate speed is not sustained by the evidence. The evidence in that regard is that her speed did not exceed 10 or 10½ knots, owing to a head wind and ebb tide."

It could hardly be urged that the hearing of petitioner's appeal on a trial *de novo* was not materially prejudiced by the unwarranted and erroneous action of the majority of the Circuit Court of Appeals, in affirming findings against petitioner that were wholly unsupported by any evidence.

If respondents' contentions are correct with respect to the binding force of the decisions of the lower courts, petitioner would be denied a review by this court merely because a commissioner and two lower courts had arrived at an obviously erroneous decision, contrary to the record, notwithstanding that the record and the dissenting opinion on appeal established that the decision was clearly wrong.

This court, in justice to petitioner, and in exercise of its discretionary right to review all admiralty causes on appeal, should not permit such an erroneous decision to stand without a re-examination of the record and a careful consideration of the argument and conclusions set forth in the able dissenting opinion.

A review of the entire record on the only issue that was considered by the majority of the court on appeal, namely, the alleged violation of the "narrow channel" rule, will show clearly that the finding of the commissioner was based *solely* upon the Conway chart, an erroneous computation of the "Edward Luckenbach's" alleged position.

This chart, however, was rejected by the appellate court, majority and minority alike.

The majority opinion states (R. 1427):

> "We will not undertake to appraise the value of the charted course, and we have given it little consideration in evaluating the testimony."

In the dissenting opinion Judge Wilbur stated that the chart "should be entirely disregarded" (R. 1441) and that it was "utterly worthless" (R. 1442).

Nevertheless, the majority of the court affirmed the decision against the "Edward Luckenbach", which decision was based on the commissioner's findings of the position allegedly established by the Conway chart.

The dissenting opinion, however, reached the *contrary* conclusion, stating (R. 1457):

> "I conclude that the Edward Luckenbach was not at fault in passing to the left hand side of the channel or in failing to allow sufficient space for safe passage of the Feltre."

From the foregoing, and upon the grounds set forth in the petition and accompanying brief, and particularly in the dissenting opinion of Judge Wilbur, we are confident

that this court will determine that the erroneous decision of the majority of the Circuit Court of Appeals should be reviewed and that petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

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